ANNUAL REPORT

for the year ending
December 31, 1997

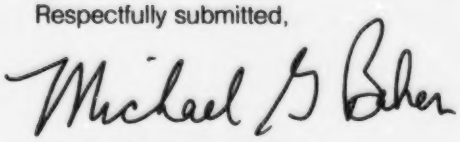
Workers' Compensation Appeals Tribunal

To Her Honour
The Honourable Myra A. Freeman
Lieutenant-Governor

May It Please Your Honour:

I have the honour to submit the annual report of the Workers' Compensation Appeals Tribunal for 1997.

Respectfully submitted,



Michael G. Baker, Q.C.
Minister of Justice

100-06872/

Michael G. Baker, Q.C.
Minister of Justice

Dear Honourable Minister:

The Workers' Compensation Appeals Tribunal is pleased to present its Annual Report for 1997.

Respectfully submitted,

K Carrigan

Katherine F. Carrigan
Chief Appeal Commissioner

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Focusing on the Possible

REPORT OF THE CHIEF APPEALS COMMISSIONER

The biggest challenge facing the Tribunal during 1997 was the growing volume of appeals in the system. This was our second full year of operation and we continued to work hard, aiming to write high-quality decisions and to develop precedent. However, the volume kept growing at an alarming rate, and our ability to adjudicate some of the most long-standing appeals was restricted as a result of a Court of Appeal decision that came down in April. This double-edged problem was our major concern during the year. As Chief Appeals Commissioner, it was certainly what occupied most of my time and thoughts.

In response, we put a couple of processes in place, and the first of these was the hiring of additional full-time Appeal Commissioners to help handle the volume. In the spring we launched a province-wide competition, which resulted in the hiring of six new Commissioners in August. Due to the specialized nature of workers' compensation law, extensive training was required, and we did most of it in-house. This meant a time commitment on everyone's part.

The hiring essentially doubled our full-time legal staff, taking us from six full-time Appeal Commissioners to twelve, so it is certain to speed things up significantly. We will not be able to feel its full impact until 1998, but our new Appeal Commissioners have been writing decisions since well before year-end, and they have brought a wealth of relevant experience to the Tribunal.

The other thing we are really quite pleased about is the Alternative Dispute Resolution project (ADR), which we introduced on a trial basis in May. The ADR process is available at the present time only for the Transitional Appeals (appeals which once formed part of the Appeal Board's caseload). ADR is a voluntary process whereby an appellant—accompanied by a Workers' Adviser or other legal counsel—sits down with a WCB representative to see if a mutually agreeable solution can be reached. The ADR process, which is facilitated and overseen by a WCAT Appeal Commissioner, is not appropriate for every claim, but we have found it to work in a significant number of cases. Three positive aspects are the fact that it gives appellants a chance to be heard in a face-to-face setting; it allows them to move through the system much more quickly; and it requires and encourages cooperation between the WCB, the Workers' Advisers Program and the Tribunal.

As is the case with any new undertaking, the ADR project has not been without its bumps, both procedural and from a client-satisfaction perspective. However, all parties in the process have worked hard to overcome these, and the project continues to succeed. I believe that this, in and of itself, is a key to helping us alleviate the backlog of appeals in the system. With WCAT Appeal Commissioners facilitating approximately 90 ADR sessions a month, the project takes up a considerable percentage of the Tribunal's time and will continue to do so, but we have found it to be a more than valuable use of our resources.

A significant thing that happened this year—and one that restricted our ability to adjudicate certain appeals—was the Court of Appeal decision on our Doward decision. This is described in more detail at pages 17 and 18, but basically the Court agreed with us on some issues and disagreed with us on others, and the issues on which it disagreed demanded a substantive change in the way we interpret the Workers' Compensation Act.

The Doward decision left us in a situation where the law on how to adjudicate chronic pain claims for persons injured between March 23, 1990 and February 1, 1996 is in a state of flux. In addition, the decision has implications for numerous issues that are only minimally related to the Doward case itself. Therefore, many of the decisions we have written this year were much more difficult and time-consuming than they otherwise would have been; and then there were other decisions—in particular, those dealing with chronic pain—which we were unable to render. This delay was due to the fact that we had to rehear the Doward case, as we were directed to do by the Court of Appeal, and as we did in November 1997. While chronic pain appeals were put on hold as far as WCAT issuing decisions, the ADR process was made available to appellants suffering from chronic pain, and a significant number of these claims were settled.

I have received many phone calls from injured workers whose appeals have been put on hold, and although I certainly cannot claim to understand what they are going through, I can appreciate their frustration. The whole workers' compensation system is going through the relatively intense growing pains that any restructured system with new legislation is probably bound to experience. What is very unfortunate in this instance is the number of people whose lives are affected, and the depth of the impact involved.

While awaiting 1998—in the early part of which we will issue a second Doward decision, in light of the Appeal Court's findings—we have identified those appeals which we have been able to adjudicate, and continued to work on whatever we could. In other words, we focused on the possible.

I want to thank the Appeal Commissioners, new and original both, and other staff members, all of whom worked exceedingly hard this year and took on duties above and beyond the normal requirements of their jobs. Despite everyone's hard work, 1997 was, frankly, a frustrating and in many ways difficult year at the Tribunal. Between dealing with the Doward decision, hiring staff, and getting the ADR project up and running, there was a period when we could not render the volume of decisions that people had reason to expect. That we were restricted on the one hand and, at the same time, focusing on other necessary tasks is a fact. However, I know that it will not bring consolation to those workers who are still waiting for their appeals to be heard.

For them and for everyone concerned, I would note that although the year was not as productive as we had hoped from a decision-output point of view, it did have some very positive aspects. The hiring of new staff and getting the ADR project under way—these are the achievements that were possible. They have already been of benefit, and will lead to a more effective system in years to come.

In closing, I would reassure all concerned parties that the just and timely hearing of injured workers' and employers' appeals is, and will always be, our purpose.

Judith F. Ferguson
Chief Appeals Commissioner
(August 1995 – May 1999)

Who's New at WCAT

Keith Crocker was born in Corner Brook, Newfoundland, and received his law degree from Dalhousie University. He gained extensive knowledge of workers' compensation during 20 years as legal counsel, and eventually corporate secretary, at Devco (the Cape Breton Development Corporation).

Joyce Dassonville, originally from Pictou County, worked as a nurse before entering the legal profession. As a lawyer in a busy litigation practice in British Columbia, she specialized in workers' compensation, family law, and motor vehicle accidents.

Donna Foulkes has a Masters in Public Administration degree in addition to her law degree and was a departmental administrator at Dalhousie University for 10 years. She was one of WCAT's part-time Appeal Commissioners before joining the Tribunal on a full-time basis, and her community work includes sitting on the Board of the Public Legal Education Society.

Before joining the Tribunal, **Leanne Hayes** was employed with the Nova Scotia Department of Justice, where her work included assessing compensation claims for physical and sexual abuse at provincial institutions. A Dartmouth native, her experience also includes two years with a general practice law firm in Windsor, Hants County.

Glen Johnson worked in Toronto for six years as Counsel to the Immigration and Refugee Board, the largest tribunal in Canada. Born in Halifax, he studied political science and law at Dalhousie University, where he was active in the student union and in publishing the Gazette.

Educated in Saskatchewan, **Susan Woolway** practised law in Antigonish for a number of years. She served as a Workers' Adviser from 1990 to 1994, and has volunteered on several boards, including those of Family Mediation Nova Scotia, Festival Antigonish, and the Antigonish Women's Resource Centre.

"Each of us brings a different perspective to the Tribunal. For me, with a background in public sector management, it is fascinating to see an administrative tribunal in operation as a public policy tool, and to be part of that process."

– Donna Foulkes, Appeal Commissioner

The Backlog: A Primary Concern

The volume of appeals waiting to be heard by the Tribunal continued to be the major source of concern during 1997. The number of transitional appeals (those which were formerly part of the old Appeal Board's caseload) being filed with the Tribunal decreased significantly, but this was offset by an increase in the number of new appeals being filed.

In total, WCAT received 1108 Applications for Leave to Appeal in 1997, a drop from 1510 in 1996, but a smaller drop than had been anticipated. In addition to the steady volume of appeals coming into the system, there were several circumstances that impacted upon the volume of decisions issued by the Tribunal for the year.

On April 18 the Nova Scotia Court of Appeal delivered its decision on the appeal of WCAT's Doward decision (see pages 17 and 18 for a synopsis). Due to the nature of the Court's disagreement with aspects of WCAT's decision, its ruling had a significant impact on the way the Tribunal would adjudicate appeals in general, and particularly those involving chronic pain. The Court of Appeal remitted the matter back to the Tribunal, with instructions to readjudicate the Doward appeal in light of the Court's findings.

The earliest date the appeal could be reheard was in November 1997 because counsel for both the appellant and the Workers' Compensation Board needed to arrange for a number of medical experts to testify. The appeal was reheard over a one-week period in November. However, until the Tribunal has rendered its second Doward decision, it will not be able to hear appeals for any similar claims: the results of the Doward rehearing will, of course, have an impact on like cases. Unfortunately, this means that a significant number of appeals in the backlog have been put on hold until the decision is released.

"There would have been a backlog with or without the Doward decision, but the Doward decision certainly did have a huge impact on our ability to adjudicate certain types of claims."

- Judith Ferguson, Chief Appeals Commissioner

Additional delays occurred during the first several months of the year because many of the Tribunal's resources were focused on the development and initial implementation of the Alternative Dispute Resolution project (ADR). The results of the ADR initiative have been very encouraging (see pages 7 and 8). It provides an alternative to the traditional hearing process, and assists in decreasing the backlog by allowing claims to move through the system more quickly. The only negative impact has been in the short term: while the ADR project was being established, some Appeal Commissioners involved had less time in which to write decisions.

In August, six additional full-time Appeal Commissioners joined the Tribunal. They began working on decisions in mid-fall, and it is anticipated that their hiring will be of great help in decreasing the backlog. Once again, however, a short-term sacrifice of time was required. The Tribunal's more senior Appeal Commissioners were involved in training their new colleagues, and this reduced their ability to render the projected number of decisions.

In summary, the Tribunal recognizes that it did not achieve its target projections for decision-writing during 1997 and will endeavour to be more successful in this regard in 1998. Addressing the backlog of appeals in the system continues to be WCAT's first priority. The re-issuing of the Doward decision, in combination with the infrastructure which is now in place (i.e., more staff, and the ADR process), will make it possible to address the backlog in a more effective manner in the year to come.

ADR: A Voluntary Alternative

During 1997, WCAT established an Alternative Dispute Resolution project (ADR) on a pilot basis. The ADR process allows an appellant, accompanied by a Workers' Adviser or other legal counsel, to sit at the same table with a WCB representative, and with a WCAT Appeal Commissioner who facilitates and oversees the session. It provides a non-adversarial and relatively informal environment in which the appellant can attempt to resolve an outstanding dispute with the WCB.

ADR is a WCAT initiative, undertaken in conjunction with the WCB and the Workers' Advisers Program. The seeds of the project were planted in 1996, when Chief Appeals Commissioner Judith Ferguson learned of a similar project which had proven successful in Quebec, where it had helped to eliminate a backlog of cases. During 1996, Ms. Ferguson approached the WCB and the Workers' Advisers Program, both of whom agreed to take part in a pilot project; and two of the Tribunal's Appeal Commissioners took mediation training to prepare for the facilitating role.

A Process Committee was struck, made up of representatives from WCAT, the WCB and the Workers' Advisers Program. The Committee established procedures for the project, addressed any concerns as they arose, and has continued to ensure that the process is monitored on a consistent basis. Each of the three sectors has committed specific individuals to the ADR project. At WCAT, Appeal Commissioner Annette Boucher chaired the Process Committee, and she and fellow Commissioner John Greer have facilitated most of the sessions.

ADR is available for transitional appeals only, although there is a possibility of expanding it in future. In the spring of 1997, the Process Committee selected 25 test cases (straightforward situations where there was reason to expect flexibility on both sides) through which to test and refine the ADR process. These cases, all of which reached settlement, allowed the Committee to work out details such as how long the sessions would take and what kind of setting was most suitable.

"If it hadn't been for the Process Committee, with the three different parties sitting around the same table and talking about how things could work, this project would never have gotten off the ground. Cooperation and communication are germane to the ADR process itself, and to its development."

- Annette Boucher, Appeal Commissioner

Since July, the Tribunal has been sending approximately 100 invitations a month to those transitional appellants who are eligible. The invitations go out in chronological order (based on the date the appeal was filed with WCAT) and recipients are to contact the Tribunal if they are interested.

Intrinsic to the ADR program is the fact that it is totally optional. It can, in a sense, be thought of as an "add on" to the hearing process. Appellants who choose to participate in ADR do not lose their place on the wait list for a hearing. If their session does not result in settlement, they go back to where they were on the list (which will now be shorter because of other claims which have achieved closure through ADR). Regardless of the outcome, many appellants have expressed satisfaction at having had a chance to be heard. Even an oral hearing, which is also face to face, does not provide exactly the same opportunity because the structure is more formal and there is no room for discussion back and forth.

Approximately 70 per cent of appellants accepted the invitation to take part in ADR, so the demand was such that many sessions had to be put ahead until 1998. During the last months of 1997, 236 ADR sessions (approximately 90 a month) were held in Halifax, Kentville, Sydney, Yarmouth, and New Glasgow. A hundred and eighty-one of these resulted in settled appeals (76.4 per cent), 44 did not settle (18.6 per cent), and 11 were cancelled or withdrawn (4.7 per cent). Although the settlement rate is clearly very high, another important element of the ADR project is an awareness that not all claims will reach closure in this manner, nor should they. Some situations turn out to be legally complex, and the appellants' needs can best be served through a regular hearing.

If a solution is reached, an agreement is signed on the spot. If not, the appeal will go back to its place on the wait list for a hearing. The proceedings of the ADR session are confidential, and the Appeal Commissioner who facilitated it will not be the one to hear the case should the appeal not resolve at ADR.

Even where settlement has not been reached, most ADR sessions have closed with a shaking of hands. In addition to reducing the waiting time for many injured workers, ADR helps to open the lines of communication for individual appellants and the system as a whole.

The Doward Decision

Lorraine Doward v. *the Workers' Compensation Appeals Tribunal and the Workers' Compensation Board (N.S.)* (1997), 160 N.S.R. (2d) 22 (C.A.).

In early January 1997, the Tribunal's first final decision (96-010D) was appealed to the Nova Scotia Court of Appeal. The Court's findings had a major impact on the interpretation of Nova Scotia's new workers' compensation law, because the appeal raised many issues which were of relevance to other cases.

The claim in question was that of Lorraine Doward, a former office worker who had suffered a workplace injury in 1990 and subsequently developed chronic pain. When the Tribunal upheld the WCB's finding that the appellant was not eligible for permanent benefits (although for different legal reasons), she took her case to the Court of Appeal.

The Court released its decision on April 18, 1997. Although it agreed with certain aspects of the Tribunal's decision, it disagreed with others, thereby requiring a substantive change in how the Tribunal interprets significant sections of the Workers' Compensation Act. It is important to note that this decision dealt solely with s.228 of the Act. In essence, the Court of Appeal concluded that:

- Should the Tribunal determine that an oral hearing is warranted in a case, it must hear testimony from all participants and witnesses who wish to present. This ruling could potentially affect any appeal, and means that the Tribunal can no longer hold oral hearings for the sole purpose of hearing new evidence or legal arguments on new areas of the law.

- "Correctness" instead of "patent unreasonableness" is the standard of review which the Tribunal shall apply to WCB decisions. This ruling affects all appeals, and means that the Tribunal must overturn any decision it deems to be "incorrect" instead of only those decisions which it deems to be "patently unreasonable."

- One exception will be made: if the Hearing Officer had an advantage which the Tribunal did not have. The Tribunal has interpreted this to mean a situation in which the Hearing Officer had evidence which the Tribunal did not (i.e., if the Hearing Officer heard oral testimony, while the Tribunal did a paper review). In such cases, the Tribunal will defer to the Hearing Officer's decision unless it is deemed to be "patently unreasonable."

- The provisions of the former Workers' Compensation Act shall apply to s.228 appeals; (section 228 appeals involve workers who were injured during the "window period," on or after March 23, 1990 and before February 1, 1996 and who are seeking a permanent award). This ruling (which upholds the Tribunal's findings), affects all s.228 appeals that involve chronic pain by exempting them from the new Act's stipulation that chronic pain is not compensable as a permanent disability.

- When adjudicating s.228 appeals, the Tribunal is not bound by the WCB's Permanent Medical Impairment (PMI) guidelines, which are incorporated as policy under the Act, when dealing with appellants seeking permanent benefits for injuries that occurred between March 23, 1990 and February 1, 1996, and where the appellants would have received a 0 per cent rating under the PMI Guidelines. This ruling overturns the Tribunal's finding.

- The WCB's Functional Restoration Program (FRP) Regulations, which establish an exclusive means for compensating workers with chronic pain, cannot be applied retroactively to s.228 appeals. This ruling (which upholds the Tribunal's findings), affects all s.228 chronic pain appeals in which the workplace injury occurred prior to the implementation of the new Act, on February 1, 1996. It means that these appellants cannot gain access to the FRP (treatment) program, but they will be exempted from the stipulation that chronic pain is not compensable as a permanent disability.

In summary, the Court of Appeal allowed Lorraine Doward's appeal of Tribunal Decision 96-010D, and the matter was remitted back to the Tribunal to readjudicate in light of the Court's findings. Specifically, the Court instructed the Tribunal to decide whether the appellant had suffered a permanent impairment as a result of her workplace injury (in other words, to make a determination on whether her chronic pain is attributable to the injury). It directed the Tribunal to apply the former Workers' Compensation Act, as well as the re-calculation provisions in section 228 of the current Act.

A panel of three WCAT Appeal Commissioners heard further evidence and argument, including testimony from the Appellant, during a five-day hearing in November of this year. Their decision—the Tribunal's second Doward decision—is expected to be released in early 1998. As was the case with the first Doward decision, it will attempt to establish precedent and to clarify how the law should be interpreted, especially in regard to chronic pain.

The Publishing Project

Great progress was made this year in the creation of a database, containing the full text of all WCAT decisions and those of the WCB's Internal Appeals Department. A joint undertaking of WCAT and the WCB, the database will serve as a significant research tool for people working in both organizations and will also be available to the Workers' Advisers Program. Specific tasks completed in 1997 included:

- creating a thesaurus of labour and compensation-specific issues, for use in the indexing of subject matter for all decisions
- assigning subject headings and summary headnotes for all decisions.

"The database is a valuable research tool for consistency. It will help us to bear in mind the decisions the Tribunal has made in the past."

- Alison Hickey

Also in 1997, WCAT designed and worked toward establishing a site on the World Wide Web. Both the database and the website fall under the umbrella of our publishing project, the aim of which is to make information readily available for internal research purposes and also to any member of the public who is interested. A long-term goal is the creation of a WCAT Reporting Series (a bound volume containing full text of all the Tribunal's decisions), which will be housed in the Nova Scotia Barristers' Society Library and in the Department of Labour library.

To contact the Workers' Compensation Appeals Tribunal

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or toll free in Nova Scotia: 1-800-274-8281
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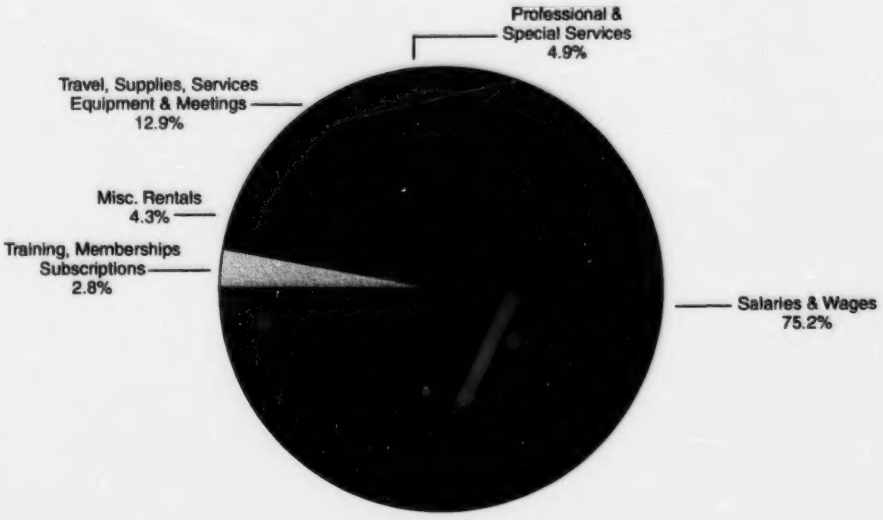
1997 Budget Expenditures

Salaries and Wages	$708,687.49
Professional & Special Services	45,835.79
Travel, Supplies, Services,	121,431.19
Equipment & Meetings	
Misc. Rentals 40,695.51	
Training, Memberships, Subscriptions	26,373.48
Total	**$943,023.46**


Professional & Special Services 4.9%
Travel, Supplies, Services Equipment & Meetings 12.9%
Misc. Rentals 4.3%
Training, Memberships Subscriptions 2.8%
Salaries & Wages 75.2%

Appeals Filed with WCAT
January 1, 1997 - December 31, 1997

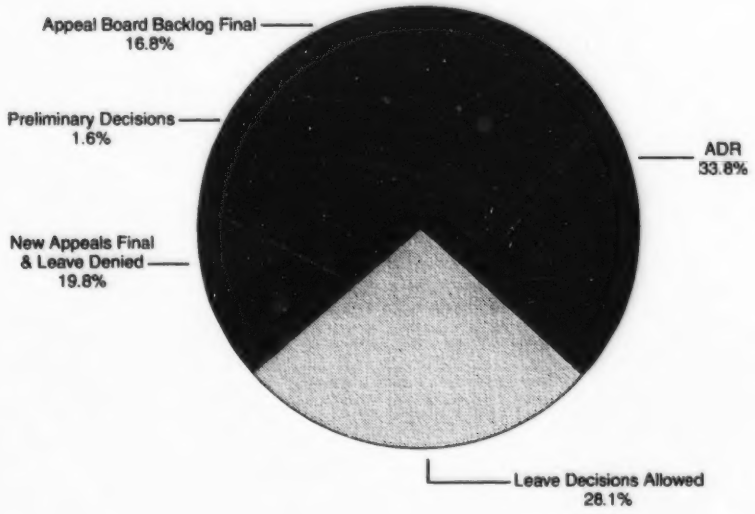
Month	Appeal Board Backlog Appeals	New Appeals	Total
January	45	64	76
February	63	54	117
March	45	96	141
April	4	103	107
May	2	85	87
June	8	82	90
July	9	104	113
August	0	75	75
September	1	88	89
October	7	96	103
November	10	80	90
December	0	79	79
Total	**194**	**973**	**1167**

Decisions and Notices Rendered and Oral Hearings Held

Hearings Held	52
Decisions Released	
Appeal Board Backlog	
Appeal Stream—Final Decisions	81
ADR	171
Preliminary Decisions	8
New Appeals	
Final Decisions	38
Leave Decisions	12
Granted	145
Denied	67
Appeal Board Backlog Notices of Leave	1114

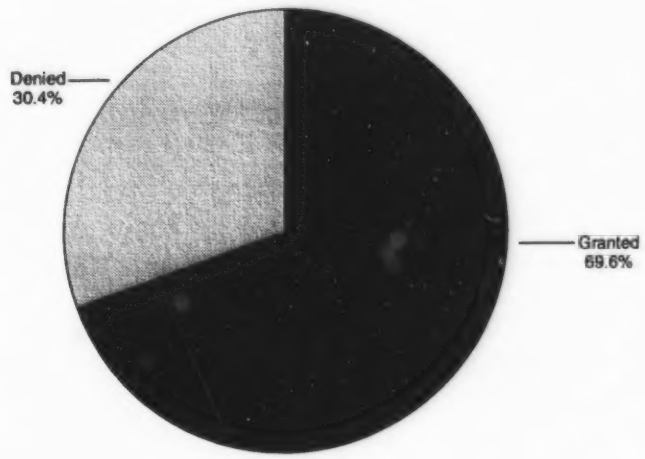
Decisions Rendered

All Appeal Types



Outcome at Leave Stage

Leave Decisions



Mode of Hearing

Final Decisions Rendered